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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

ALLAN BAKKE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Brief for Sanford H. Kadish, Dean of the School of Law, University of California at Berkeley; Pierre R. Loiseaux, Dean of the School of Law, University of California at Davis; William D. Warren, Dean of the School of Law, University of California at Los Angeles; Marvin J. Anderson, Dean of Hastings College of the Law, University of California, as Amici Curiae

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This brief *amici curiae* is filed by the Deans of the University of California Law Schools with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AMICI

The *amici* are the Deans of the four publicly supported law schools in the State of California. Under the estab-

lished regulations and by-laws of The Regents of the University of California, and of Hastings College of Law, the faculties at each of these institutions are charged with the responsibility of formulating and administering the policies governing admissions to each of the schools. Although each faculty is virtually autonomous in this respect, just as is the faculty at the medical school at Davis in the present case, each has, exercising the authority delegated to it by The Regents of the University or, in the case of Hastings by its Board of Trustees, adopted a "special admissions" program designed to avoid what would otherwise occur: the near total exclusion of minority groups and their continued token representation in the bar of this state. These "special admission" programs differ somewhat among the schools, both in the procedures used and in the size of the program. They do have one common characteristic: they deliberately rely upon race or cultural background; almost without exception all the persons admitted are members of minority groups.

The interest of the *amici* in this case is, therefore, transapparently clear. The opinion of the Supreme Court of California in this case, although rendered in a case involving admissions at the medical school of the University at Davis, also declares the law under the Constitution of the United States, as that Court interprets it, on the constitutionality of any admissions program which makes distinctions based on race. Unless this Court grants review of that decision it will remain as the authoritative statement of the highest court of the state as to the restrictions imposed by the Constitution of the United States upon the professional schools of the University of California. As law schools, the institutions which the *amici* head will be under special obligations to comply with the law as declared by the Supreme Court of California.

Although that court is less than clear as to the permissible limits of special admissions programs in University professional schools, one point is obvious: the law schools of the University of California will not be able to continue the programs which they now maintain. Although basing its decision, in large part, on the particular record made with respect to the medical school at Davis, the Supreme Court of California left no doubt about the broader application of its decision. Indeed, in footnote 34 of its opinion, (Pet. App., p. 38a) the court said that, "the rule we announce shall . . . govern . . . admission decisions made after the date this opinion becomes final in this court," at "educational institutions" generally. Those institutions include, obviously, the institutions operated under the aegis of the University of California, the defendant in the action.

We file this brief, therefore, in support of the petition for certiorari herein. It is not our purpose to adduce arguments on the merits of the constitutional issue presented by the decision of the Supreme Court of California. That is, we believe, appropriately left to the parties and to amici if certiorari is granted. It is our purpose to provide information to the Court, which we believe will be useful to it, as to the potential impact of the decision below if review is not granted. We think this is particularly important in view of the brief amicus heretofore filed by a number of organizations urging the Court to deny review. We fear that they may not have fully grasped the potential impact of the decision below on the admission of minority students to professional schools, and in particular, to law schools. As deans of our respective schools, we are keenly aware of the potential consequences and we think it is our duty to inform the Court as best we can. It is for this purpose, and this

purpose alone, that we file this brief in support of the position of the petitioner that review should be granted.

ARGUMENT

I.

Seen from the perspective of public legal education in California, the decision of the state's Supreme Court in this case poses the most grave risks to two critical and related interests. First, if the decision is complied with by terminating "special admission" programs, the movement of minority groups toward meaningful representation in the profession, at least in so far as these schools are concerned, will virtually cease. What this implies in terms of the vertical integration of American society, assertion of legal rights on behalf of minority groups, and access to the political process requires no elaboration except to note that the four schools here represented presently enroll more than 800 minority students, almost 10% of all the students from these groups enrolled in the accredited law schools in the United States.[1] Second, in so far as we can see, it is theoretically possible under the decision to avert this calamity only by creating much larger discrimination against better qualified applicants in favor of less qualified ones than now exists. Furthermore, this course of desperation, if pursued, may serve only to inflict academic and eventually, professional damage; it may not achieve significant minority enrollment. There is, simply, no method known to us, apart from either outright or surreptitious

1. The Fall, 1975 *Review of Legal Education*, LAW SCHOOLS & BAR ADMISSION REQUIREMENTS (ABA, Section of Legal Education and Admissions to the Bar), at p. 42, shows 8,703 minority group students then enrolled in ABA-approved law schools. The same publication, at pp. 7 and 9, gives a breakdown of enrollment by individual school. This shows minority enrollment for the four University of California schools of 803: UC Berkeley —227, UC Davis—161, UC Los Angeles—206, Hastings—209.

non-compliance with the decision of the Supreme Court of California, by which one of these results can be avoided. In Part II of this brief we undertake, in brief compass, to demonstrate that proposition. Here we first suggest why the considerations we develop support review in this Court of the decision below.

The decision of the California Supreme Court, while governing in California, cannot stand as an authoritative resolution of the profoundly significant constitutional issue the case presents. Only a decision of this Court can do that. If this case is not reviewed, University of California professional schools will of course have to conform to the principles announced in the opinion. Compliance with the decision entails major, most probably adverse, change in our institutions. The anticipated consequences are, either or both: (1) decline toward the vanishing point of the number of minority students or (2) reduction in the qualifications of enrolled students, quite possibly including minority students, following upon drastic and academically injurious reformulation of admission standards. In addition, an abrupt shift in admission practices (whether toward (1) or (2) above) must provoke, in the absence of a fully authoritative statement of the controlling Constitutional standard, the most intense controversy. For lack of such a statement no response the schools may attempt is clearly right, nor are a number of possible responses clearly wrong. In this setting, nothing the schools do can escape challenge from one side or another. They can only expect to find themselves in a crossfire of plausible grievance.

In a conflict of this kind, the educational process will be the first of numerous casualties and, among them, by no means the least seriously wounded. Moreover, if this Court should ultimately reach a conclusion opposite to

that of the Supreme Court of California, the schools, and the interests their admissions policies serve, will have suffered irreparable, but futile, damage. If this Court eventually modifies in any significant way the standards laid down in the court below, much that the schools will have done in the interval will likely turn out misdirected and wasteful. Even if, in the end, this Court agrees with the California court's decision, there will have been incurred in the interim the debilitating effects of accommodation, on an issue of great public concern, with an interpretation of the Constitution which, as the decision of an inferior court, cannot be said to be more than provisionally and tentatively correct.

Nor will the impact of the decision below be confined to California. Special admissions programs, so-called, have become well-established and widespread in American institutions of higher education. Henceforward, they all must live in the shadow of this decision. The opinion, reflecting the views on a widely debated question of one of the most influential state courts in the country, must be given serious consideration outside California even while it can be controlling only within California. The opinion is relevant to the adoption, continuance, design and administration of all such programs, but no one can tell whether its prophecy of this Court's decision is true or false. The California court's decision will intensify and complicate debate but cannot settle it. This will be especially clear in the litigation the case seems sure to stimulate (in which plaintiffs will have a choice between state and federal courts, depending upon which seems locally more sympathetic). In all such litigation the parties and the courts will feel compelled to test whether the court's "least onerous means" criterion has been met even while they debate whether it should be

held to apply at all. Meanwhile, we know of no case presenting the same issue which can reach this Court soon.[2] Indeed, in view of the fact that the standing of an applicant to bring suit will undoubtedly be challenged, as was plaintiff's in this case, on the ground that he or she would not have been admitted even in the absence of the special admissions program, the class of plaintiffs eligible to contest the constitutionality of special admissions programs is extremely limited, and it may be many years before another case can reach the point where review may be had in this Court.

We advance these considerations to add to the reasons for granting review already given in the Petition for Certiorari, with which we agree. In our view, the occasion anticipated in *De Funis v. Odegaard*, 416 U.S. 312 (1974), has arrived. This is the case, and the only case, which gives this Court the opportunity, "with relative speed" (416 U.S. at 319), to address the constitutional question which the mootness of the case obliged this Court to leave unanswered there.

II.

It is our purpose here to describe, with as much precision as possible given the somewhat uncertain language of the Supreme Court of California, the effect of its decision on public legal education in the State of California. We do not have data from the nation as a whole, although we are informed that statistics are being compiled and will be published before the present case is heard if certiorari is granted. We do have and will provide in this brief statistics showing the potential impact of the decision on one school, the law school of the University of California at Berkeley

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2. We recognize that the brief of amici National Urban League, *et al.*, states, "Many other similar cases are now on their way to this Court" (Brief at p. 22). We note that no such cases are cited.

(Boalt Hall). Although the admission programs at the other public law schools of the state differ somewhat in history, detail and size, the Boalt data present an accurate microcosm of the state schools as a whole and, we believe, are as well reasonably representative of the major law schools of the country.

The first element in any picture of the history and present posture of law school special admissions programs is the background against which they operate: the recent explosive growth in the volume of applications to law school and the concomitant substantial increase in the number of highly qualified applicants who will, inevitably, have to be denied admission.

Thus, until quite recently Boalt, like most law schools, admitted nearly every qualified applicant who applied. Until 1961 any college graduate who had achieved a B average would automatically be admitted to Boalt Hall. Many who had less than a B average were admitted if they could persuade the School that their record was misleading. The LSAT test was required only for those who had not achieved a B average and a score in the 500's was sufficient for admission. In 1960, there was 708 applicants. 517, 73% of the applicants, were admitted; 53% of those admitted enrolled, for a resulting class size of 268.

In the years since 1960 the number of applicants has risen enormously while the size of the entering class has remained substantially the same. In 1966 there were about 1500 applications and a class of 278. By 1972 the number of applications received and considered had grown to a high point of approximately 5000. Of those 5000, only about 10% were sent letters of admission, and only 271 actually enrolled in the fall. The class, in short, consisted of about

5% of those who had applied for admission. Since then the flood has abated somewhat but the volume is still high.

At the same time, the quality of the applicants, as measured by LSAT scores and undergraduate records, also increased. This meant that, with no increase in class size, the standards for admission to Boalt escalated rapidly. In 1960, any applicant who had a B average as an undergraduate, and indeed some who did not have such an average, could obtain admission to Boalt without regard to his or her LSAT score. In 1967, the median LSAT score of those admitted was 638. By 1976 the median LSAT score of those admitted under the regular admissions program had risen to 712, a score which represents the top 3% of all of those taking the LSAT. The grade-point average was correspondingly high: 3.66. It is quite clear that the level of record achievement required to gain admission to Boalt Hall is far in excess of the level which would be required if the sole criterion were a record sufficient to justify a confident prediction that the applicant could successfully complete the program of instruction and become a competent member of the bar. Table 1 presents the entire picture at Boalt Hall in the ten-year period from 1965 through 1976.

TABLE I

Statistical Summary of Applications, Admissions and Enrollment 1965-1976

Applications	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976
Mailed	3,298	3,105	3,462	4,053	5,832	8,369	11,892	13,382	14,152	14,327	14,928	13,493
Returned	1,486	1,465	1,471	1,988	2,610	3,697	5,605	5,602	3,973	3,690	3,250	3,549
Considered	1,410	1,347	1,355	1,724	2,340	3,353	4,952	4,958	3,558	3,457	3,093	3,365
W/D before action	76	118	116	264	270	344	652	644	415	233	157	184
Denied	871	800	817	1,049	1,674	2,739	4,387	4,372	2,934	2,830	2,471	2,694
Admitted	539	547	538	675	666	614	566	586	624	627	622	671
Of Those Admitted												
W/D after admitted	252	262	273	346	392	294	256	299	332	338	320	361
No Show	10	7	8	51	—	21	16	16	4	3	13	17
Total Enrolled	277	278	257	279	274	299	294	271	288	286	289	293
Entering Class Medians												
Median G.P.A.		3.4	3.4	3.4	3.5	3.5	3.6	3.2	3.5	3.5	3.5	3.6
Median L.S.A.T.		622	638	635	644	641	649	673	691	703	692	704

Boalt's experience is, we believe, typical. The national growth in applicants as contrasted with the number of entering positions available is indicated in the following Table 2, taken from Memorandum EC76-124, dated November 2, 1976, from Millard H. Ruud, Executive Director of the Association of American Law Schools, to the Executive Committee of the Association.[3]

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3. The same table, but through 1974 only, appears in White *Is That Burgeoning Law School Enrollment Ending?*, 61 ABAJ 202, 203 (1975). (It should be noted that the column for "LSDAS Completions" which appears there mistakenly shows as figures for 1971, 1972 and 1973 numbers which correctly apply to 1972, 1973 and 1974, as shown in the table in the text.)

TABLE 2
Legal Education and Bar Admission Statistics
1963-1975

Year	Total	Enrollment Women	First Year	L.S.A.T. Taken	L.S.D.A.S. Completions	J.D. or LL.B. Awarded	New Admissions to the Bar
1964	54,265	2,183	22,753	37,598		10,491	12,023
1965	59,744	2,537	24,167	39,406		11,507	13,109
1966	62,556	2,678	24,077	44,905		13,115	14,644
1967	64,406	2,906	24,267	47,110		14,738	16,007
1968	62,779	3,704	23,652	49,756		16,077	17,764
1969	68,386	4,715	29,128	59,050		16,733	19,123
1970	82,499	7,031	34,713	74,092		17,183	17,922
1971	94,468	8,914	36,171	107,479		17,006	20,485
1972	101,707	12,173	35,131	119,694	80,364	22,342	25,086
1973	106,102	16,760	37,018	121,262	81,913	27,756	30,707
1974	110,713	21,788	38,074	135,397	85,999	29,045	33,358
1975	116,991	26,737	39,038	133,546	83,100	29,961	34,930
1976				134,724	82,243		

NOTES: Enrollment is that in American Bar Association-approved schools as of October 1. The L.S.A.T. tests taken volume is given for the test year ending in the year stated. Thus, 135,397 administrations of the L.S.A.T. occurred in the test year July, 1973, through April, 1974. There were 133,546 administrations of the L.S.A.T. in the test year July, 1974, through April, 1975. There were 83,100 persons who utilized the Educational Testing Service L.S.D.A.S. service (completed law school applications and requested that L.S.A.T. results and undergraduate transcripts be sent to at least one school). J.D. or LL.B. degrees are those awarded by approved schools for the academic year ending in the year stated. Thus, 29,971 degrees were awarded in the year beginning with the fall, 1974, term and ending with the summer, 1975, term.

As this table shows, the number of LSAT examinations taken has grown from less than 38,000 in 1964 to more than 133,000 in 1975. The number of Law School Data Application Service (L.S.D.A.S.) completions is probably the best available indication of total applicants, since many who take the LSAT do not complete their applications. Although comparative figures going back to 1964 do not exist, as the L.S.D.A.S. began operation only in 1972, the figure of 83,100 for 1975 stands in sharp contrast to the number of first-year students enrolled that year: 39,038.

The second element in the picture is the absence, until recently, of any significant representation in the bar, and in law school, of members of minority groups. Thus, for example, in 1970 there were 355,242 lawyers in the United States, yet only 3,845 were Black, or scarcely more than 1%.[4] The number of Chicano, or Mexican-American, lawyers was far smaller, we believe, both in absolute numbers and in relationship to population percentage. During the period until 1968 Boalt Hall, like most law schools, had very few minority applicants. We have no figures before 1968, but it is probable that the number of minority applicants in any year before that never exceeded 20, and was usually even lower and nearly all who applied were admitted. Beginning in 1966, active efforts were made to encourage applications from minority groups, but these did not begin to bear substantial fruit until 1968.

The recruitment effort, which was the progenitor of what is today called the "special admissions" program, took formal shape in the 1967-68 academic year. At that time the school encouraged the then few minority students to undertake extensive recruitment activity and simultane-

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4. See Linn, *Test Bias and the Prediction of Grades in Law School*, 27 J. Leg. Ed. 293-94 (1975).

ously solicited a special scholarship fund for financial aid to minority students. The recruitment program was quite successful. For the class entering in 1968, there were 60 completed applications: 37, or 61% were admitted and 20 were actually enrolled. In the succeeding years the number of applications from minority groups increased substantially.

There then followed, on a delayed basis, a development with respect to minority applicants paralleling the earlier development with respect to others. At the beginning of the program the perceived problem was the scarcity of qualified applicants. Hence the criterion used for determining whether a minority applicant would be admitted was whether, on the basis of his undergraduate record, his LSAT score, and such other material available with respect to him, it could reasonably be predicted that he would be able to complete successfully the program of instruction at Boalt Hall. Minority applicants until about 1971 were, in effect, treated in substantially the same way as all applicants who had been considered in the years prior to 1961. There was no target or goal; all who were qualified were admitted. This was true even though, at the same time, the admission standards for non-minority applicants were already well above that level and ascending rapidly.

The increase in the number of minority applicants in the early '70s made it necessary to put a ceiling on the number of minority students admitted in this way. This was done by limiting the percentage of the class admitted under the special admissions program (just as in the present case, the Davis Medical School limited the number admitted annually pursuant to the "Task Force" procedures to 16, or 16% of the class). This was done formally by a resolution adopted in 1973 which provided a limit on the special

admissions program of 25% of the entering class. The text of the faculty resolution is set forth in Appendix A to this brief. The 25% limitation was not a "quota" in the sense of a limit on the total number of minority group members to be admitted to the school, since no discrimination existed in the regular admissions program and a few, although only a few, members of such groups were admitted regularly each year. Nor was it a "quota" in the sense of a guaranteed number of admissions, irrespective of qualifications. At Boalt the number of students actually admitted under the minority admissions program has varied from year to year as, in the words of the faculty resolution, there were "shifts in the quality and availability of applicants . . ." The result of this program is set forth, with respect to Blacks and Chicanos, in the following Table 3.

TABLE 3

Boalt Hall

Black and Chicano Students—1969-1975

	Year of Entrance								
Blacks	**1969**	**1970**	**1971**	**1972**	**1973**	**1974**	**1975**	**1976**	**Total**
Enrolled	18	31	38	30	24	25	30	30	226
Graduated	15	24	28	28	21	—	—	—	116
Took Ca. Bar	11	18	25	19	17	—	—	—	90
Passed Ca. Bar	9	12	17	13	9	—	—	—	60
Chicanos									
Enrolled	19	19	38	28	28	28	27	24	211
Graduated	19	13	29	25	24	—	—	—	110
Took Ca. Bar	18	12	22	21	19	—	—	—	91
Passed Ca. Bar	14	7	13	11	13	—	—	—	58

Several points should be noted in Table 3. First, in the years since 1969 there were 118 Blacks and Chicanos who became members of the California Bar as a result of this program, a number which will be increased with the second administration of the bar examination for those graduating in 1976 (i.e., entering in 1973), and will be further increased when those who entered in 1974, 1975 and 1976 have graduated. The second point that should be noted is that the total number of members of the California Bar does not represent the total accretion to the legal profession; a small number of the students admitted under the "special admissions" program are not residents of California and have taken the bar in other states. We have no statistics as to their success.

It remains for us to demonstrate that results of the kind illustrated above would not have occurred except for a special admissions program of the kind declared unconstitutional by the Supreme Court of California. This demonstration requires a somewhat more detailed explication of the admissions process used at Boalt Hall. The primary, although not the exclusive, determinant of whether an applicant will be admitted, either in the regular or special admissions program, is an index figure called the PGA, or predicted grade point average. This is computed by a formula, calculated by the Educational Testing Service from this school's experience data, which shows the combination of scores on the tests administered by that service and the applicant's undergraduate grade point average that will best predict his or her performance in the first year of law school. This formula is validated and recalculated at frequent intervals, in recent years annually, and directly relates the actual performance of Boalt students to their LSAT scores and undergraduate scholastic performance.

The figure derived from this formula is expressed in terms of a numerical grading system, no longer used in reporting grades to students, but calculated for this purpose. Under that system 65 represents a minimum passing average. The most recent validity study, completed in September 1976, shows a correlation coefficient of .69 between the first-year grades of the 1975 entering class and the LSAT and undergraduate grade point average, weighting them so that a 30% weight is given to the undergraduate average and a 70% weight is given to the LSAT.

Although this is a very high correlation coefficient, the PGA is not relied upon exclusively. At one time, the school conducted interviews of many minority applicants. These were not found to be particularly helpful and have been discontinued. But such factors as disadvantaged background, substantial time commitments while in undergraduate school, poor performance on standardized tests and letters of recommendation are taken into account in evaluating individual files in making admissions decisions. The PGA remains, however, as the primary indicator.

In this again Boalt is representative of American law schools, almost all of which require the LSAT and use it in combination with undergraduate performance in making admission decisions. The usefulness of this measure for the purpose of selecting students who are most likely to be academically successful is supported by hundreds of validity studies.[5] Furthermore LSAT scores and undergraduate

5. See Linn, supra, n. 4, at p. 306: "There is substantial evidence in the form of hundreds of validity studies to support the practice of using a weighted combination of LSAT and UGPA or the LSAT, UGPA, and WA to obtain the predicted first-year average (PFYA)." See *id.*, at pp. 305-16, for a survey of the studies suggesting that these measures, if anything, overpredict the performance in law school of Blacks and Mexican-Americans.

grades have been found to correlate with all three years in law school and with bar examination results.[6]

The PGA (or, as it is called in some institutions, the predicted first year average, or PFYA) cannot, of course, be used to predict with certainty the performance of each individual, or to select among applicants with closely comparable scores. But, on average, and particularly between applicants with highly diverse scores, it is quite useful. And it is, in any event, the best tool yet devised.

Using this measure, the following tables show the distribution of the applicants to Boalt Hall during the past three years, as disclosed by the records maintained in the admissions office.[7]

6. See Carlson & Werts, Relationships Among Law School Predictors, Law School Performance and Bar Examination Results, Princeton, New Jersey, Educational Testing Service (1976).

7. The PGA numbers shown in the three following tables are not quite commensurate because there were slight changes in the formulas used in the three years they cover, based on successive validity studies. It is possible to recalculate the numbers on the basis of the most recent study covering a three-year period and to interpolate between the differing gradations used, but the distribution pattern we seek to show would not be altered, and we prefer to submit the figures as they appear on our records.

TABLE 4

BOALT APPLICANTS—1974

PGA	White	Asian	Black	Chicano	Native American
78.0 and over					
Applied	574	13	0	1	0
Admitted	403	8	0	1	0
77.0-77.9					
Applied	403	2	0	2	0
Admitted	42	1	0	1	0
76.0-76.9					
Applied	446	23	3	5	1
Admitted	11	6	2	3	1
75.0-75.9					
Applied	394	25	3	7	0
Admitted	7	9	3	3	0
Below 75					
Applied	1,013	93	182	170	14
Admitted	9	5	60	33	5
Unknown					
Applied	52	5	4	6	0
Admitted	10	0	4	0	0

NOTES: In this and the succeeding tables the entry "Applied" includes only those applications fully completed. The "Unknown" category refers to applications lacking either a grade point average or an LSAT score, e.g., applicants from ungraded colleges or blind applicants. On Tables 4 and 5 the category "White" includes those listed as "Other" in Table 6.

TABLE 5

BOALT APPLICANTS—1975

PGA	White	Asian	Black	Chicano	Native American
76.7 and over					
Applied	206	3	1	0	0
Admitted	189	3	1	0	0
75.8-76.6					
Applied	377	10	1	1	0
Admitted	168	9	1	1	0
75.0-75.7					
Applied	427	22	0	3	0*
Admitted	58	14	0	3	1*
73.0-74.9					
Applied	905	55	16	14	2
Admitted	37	8	16	8	1
Below 73					
Applied	559	85	207	149	12
Admitted	7	2	51	33	3
Unknown					
Applied	61	2	1	1	0
Admitted	7	0	1	0	0

*Apparent computer error.

TABLE 6

BOALT APPLICANTS—1976

PGA	White	Asian	Black	Chicano	Native Am.	Other
76.6 and over						
Applied	351	5	0	0	0	0
Admitted	300	5	0	0	0	0
76.4-76.5						
Applied	101	1	1	0	0	0
Admitted	52	1	1	0	0	0
75.7-76.3						
Applied	415	6	0	2	0	0
Admitted	106	3	0	2	0	0
75.0-75.6						
Applied	441	4	0	4	0	1
Admitted	36	0	0	3	0	1
Under 75						
Applied	1,431	130	245	183	13	8
Admitted	20	9	57	44	4	7
Unknown						
Applied	69	8	7	12	0	0
Admitted	14	2	0	5	0	0

The crux of the matter can be expressed in one simple table, compiled from the above and adding the number of applicants admitted and the number actually enrolled:

TABLE 7

Three-Year Totals, 1974-76

PGA	White		Black and Chicano	
75 and over:				
Total Applicants	4,126		34	
Admitted	1,367	(33%)	29	(86%)
Enrolled	572		9	
Under 75:				
Total Applicants	3,916		1,166	
Admitted	131	(3%)	302	(26%)
Enrolled	33		149	

The above table, if anything, understates the difference in the applicant pools since most students admitted in the

regular admissions process are at some PGA number higher than 75. It should not, on the other hand, be taken to mean that the admitted Black and Chicano applicants are not well above the predicted passing level. To the contrary, the average PGA of the admitted Black and Chicano applicants over the three-year period was approximately 72.3, compared to an assumed passing average of 65. What it does mean is that there is a substantial group of qualified minority applicants clearly of the quality which would have been admitted 15 years ago but which falls well below the escalated standard which this school, like most public law schools, uses currently as a method of rationing the available spaces.

There are, we believe, two distinct reasons for the obvious discrepancy between the qualifications of the two pools of applicants. First, and so obvious as not to require explication, is the history of social, economic and educational discrimination against the minority group, the effects of which have by no means yet been eliminated from our society. Second, and not quite so obvious, is that the qualities shown in the applicant pools in part reflect the school's publication of its admission practices. White applicants at the lower range of qualifications are intentionally discouraged by the publication in the school's bulletin of the fact that the median grade-point averages and LSAT for those accepted are likely to approximate 3.5 and 700 respectively (a 75.5 PGA under the most recent formula). At the same time, the bulletin advertises the fact that minority applicants who would not meet that standard can be admitted under the special admissions program and the school seeks actively to recruit applications from members of minority groups. In the absence of this disparate approach to prospective applicants the number of white

applicants would be larger, adding more with lower qualifications, and the opposite would be true for the minority groups. The absolute number of the very highly qualified applicants from both groups likely to gain admission under the regular admission program, however, would remain the same.

It is precisely to avoid the virtual exclusion of minority students which would otherwise result that the special admissions program exists. Although the regular admissions process does take account of non-numerical factors such as disadvantage, extra-curricular activities, letters of recommendation and other factors, the disparity in the predicted level of performance is such that almost no applicants from racial or cultural minorities are admitted in the regular admissions process. If minority applicants are within the competitive range of predicted performance, they are considered in the regular admissions procedure, but in recent years few have been admitted: In the three-year period 1974-76, a total of 9 Blacks and Chicanos were admitted in the regular process, of whom 3 enrolled. Indeed the difference in the applicant pools is such that even if the school were to abandon selection based on comparative merit and choose by lot among those having predicted grade point averages of 75, or even 72, the number of members of the minority groups gaining admission would be very small.

The special admission program operates, in much the same way as the Davis program, by considering separately all applicants from minority groups who do not gain admission through the regular process. Judgments as to relative qualifications are made among each of the groups and, within the overall limitation imposed by the faculty resolution—formerly 25% and now 22½% of the entering class—

the best qualified are admitted. It is as a result of this separate consideration that, as seen in Table 7, 86% of the Black and Chicano applicants having PGA's of 75 and above were admitted, but only 33% of the whites, while of those below 75, 26% of the Blacks and Chicanos were admitted but only 3% of the whites.[8]

The students within the group specially admitted do have predicted grade point averages below almost all of those with whom they would have to compete in the absence of the program. And, when admitted and enrolled, they do tend to cluster toward the lower part of the class. The range of possible error in the predictor as applied to individual cases is such that some of them, it is impossible to predict which in advance, will fall into academic difficulty or fail to pass the bar. On the other hand, most do satisfactory work and a number of them outperform regular admissions students whose records appeared much better. Some specially admitted graduates, we are confident, will appear among that portion of each class which contains superior lawyers and will distinguish themselves in the profession and in public life. And, because of their race or ethnic background, they are in a position to make a unique

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8. There is one aspect of the Boalt Hall program which should be noted, and which explains the omission of data regarding Asian Americans from some of the tables presented earlier. The program is explicitly transitional, *i.e.*, it is expected to decrease, and eventually disappear, as the number of minority applicants who gain admission under the regular program increases. In accordance with this principle the faculty in 1975 eliminated Japanese-Americans from the special admissions program and reduced the participation of Chinese-Americans in light of the number of applicants from these groups gaining admission through the regular process. Because of this action, the maximum size of the special program was reduced from 25 to 22½ percent of the class. Comparisons between years, or cumulations including 1976, which included Asian Americans would, therefore, be distorted.

and irreplaceable contribution to the solution of the American dilemma.

In condemning the Davis medical school program the California court suggested that "the University is not required to choose between a racially neutral admission standard applied strictly according to grade point averages and test scores, and a standard which accords preference to minorities because of their race" (Pet. App., p. 24a). Of course. The professional schools which have set up special admissions programs never believed anything else. Each of them, in its own way, uses its best judgment in selecting the applicants it thinks will perform best as students and, upon graduation, as professionals. In the words of the Boalt faculty resolution (Appendix A), those applicants are selected who "appear to have the highest potential for law study and for achievement in and contribution to the legal profession, legal scholarship or law related activities." Judgment is not made on the basis of grade point averages and test scores alone but on as many additional personal factors as the faculty believe are relevant to the ultimate judgment. Indeed the very school involved in the present case presents a striking example of just such a wide-ranging and subjective evaluation of personal characteristics, both in its regular and its special admissions programs. The difficulty is that such an evaluation, if conducted without regard to race, would at Davis, as in the law schools, produce few minority admissions.

It is footless to suggest, as the California court seems to, that an even more wide-ranging and subjective evaluation would somehow produce a higher level of minority admissions and make a special admissions program unnecessary to "integrate the medical [or law] school and the profession." (Pet. App. p. 22a). The influence in the admissions process of undergraduate grades and test scores can

be reduced but that does not eliminate the gap in academic measures between the top layer of whites and the main group of minority applicants. In order to overcome this handicap, minority applicants would have to appear stronger than these whites on the nonacademic factors to be given extraordinarily enlarged significance relative to grades and test scores. They would also have to rank higher, on average, than the enormous mass of whites, at roughly the same academic level, most of whom do not now even apply. If academic indicators are given significant weight, minority applicants, as a group, start at a disadvantage. If there is a race-blind method of selection in a unitary program which will select out a meaningful number of persons from a relatively small group of minority applicants in competition with a much larger group of whites, we do not know what it is.

Moreover, we believe academic criteria should be given very substantial weight. Each school's regular admissions policies incorporate its judgment, in the present state of the art, of the best set of admissions criteria available. These criteria emphasize academic capacity as, for that matter, do the standards of the special admissions programs. If professional schools have given a racial preference, that is not because they wish to discriminate on grounds of race but because they have seen no other way of combining sound admissions practices with meaningful minority enrollment.

At present, we see only one means of conforming to the decision of the California Supreme Court which might conceivably maintain significant minority enrollment. The opinion explicitly disclaims requiring the schools to rely on academic merit, however reliably measured: a program giving preference on grounds other than race appears

to be permissible. Specifically, the opinion leaves professional schools free to discriminate in favor of "disadvantaged" applicants, without regard to race. For example, at Boalt Hall a portion of the class, currently a maximum of twenty-two and one-half percent, is set aside essentially for minority applicants who do not qualify by regular admissions standards. That fraction of the class might be given over to disadvantaged students.

We put to one side the serious problems of developing a coherent conception of "disadvantage", and of designing an administrable program, in order to confront more enduring difficulties. If the special admissions program were recast from a minority admissions program to a disadvantaged program, minority enrollment would almost certainly decline. The actual effect would depend on two quantities: (1) the relative number and qualifications of white disadvantaged applicants compared to disadvantaged minority applicants and (2) the number and qualifications of minority applicants who would be admitted in the present program but who would not qualify as disadvantaged. As to the latter, past experience suggests that, apart from Asians, only a very few such applicants would be admitted in the regular admissions process. As to the former, we would anticipate that disadvantaged white and Asian applicants would tend to overwhelm Black and Chicano applicants. Although it is undoubtedly true that a high proportion of Blacks and other minorities are economically disadvantaged, it is emphatically not true that a majority of those economically disadvantaged are Blacks or other minorities. In 1972, 31.9% of these minority groups were below the proverty level, as compared to 9% of the whites. But only 33.9% of those below the poverty level were

members of minority groups; 66.1% were white.[9] Alternatively, the school could increase the size of the special admissions program to accommodate an influx of disadvantaged whites in an attempt to maintain minority enrollment at something approaching its present level. This would require a much larger, and possibly intolerable, compromise of academic standards than the existing program unless, on the other hand, application of criteria of disadvantage produced only a few basically-qualified applicants of any race.

III.

The possibilities canvassed above demonstrate that the California Supreme Court, while appearing merely to require a choice of alternative means, in actuality commanded a substitution of goals. The malevolent influence of a long history of racial social and economic discrimination in American life has created a situation in which purely competitive rationing of the available spaces in professional schools or, given the available pool, even random selection, would produce very few entrants into the professions of minority groups already grossly underrepresented. For reasons set out and acknowledged to be valid by the California court (Pet. App. pp. 22ff.), this is an undesirable result and these schools have established programs designed to avoid it. But the court below would, in effect, substitute the quite different goal of compensating individuals applicants for the disadvantages they have suffered, in the hope—unproved and we believe probably vain—that it will incidentally serve the objective of maintaining significant minority enrollment and graduation

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9. U.S., Bureau of Census, *Statistical Abstract of the United States* (1974), p. 389, Table No. 631 (Persons Below Low Income Level, By Family Status & Race & Sex of Head).

into the profession. Not least, that Court's approach compels the ignoring of the disadvantages in growing up as a member of a discriminated-against racial minority.

Perhaps the Supreme Court of California was misled because the Davis program was labeled as a program for the disadvantaged. Assuming that to be its purpose, it might be permissible to conclude that a program designed to confer a benefit upon disadvantaged persons cannot constitutionally be limited by race, although opinion might differ on this subject. But what the California court concluded was something quite different. It explicitly outlawed not only racially preferential programs designed specifically to confer benefits on the disadvantaged but also programs designed to meet the urgent need for more minority doctors and, by implication, lawyers. Indeed, the court accepted *arguendo* the propriety of such a purpose—but concluded that it can not properly be achieved directly but rather must be approached obliquely, by the establishment of a program truly designed, as the Davis program was not, to benefit disadvantaged applicants without regard to race.

This has not been the objective of the special admissions programs at the public law schools of California. They are aimed, rather, at meeting in the most straightforward and direct way, the objectives declared permissible by the California court. Some of the schools (although not Boalt Hall), recognizing that pursuit of these objectives also confers individual benefits upon the successful applicants whose entrance will best serve those social and educational objectives, have elected to allocate this incidental benefit to those who have an individualized history of economic or other non-racial disadvantage. That they choose to do this, however, should not confuse the point that the basic objective of all the programs is to achieve meaningful minority representation in the schools and in the bar.

Indeed, the ruling below has great potential for mischief and uncertainty precisely because the Supreme Court of California, at least *arguendo*, accepted the goals of diversity in the student body and enlarged minority participation in medicine (or law) as a compelling state objective while at the same time it declared unconstitutional program designed to achieve that objective directly. We could understand, although we would disagree strongly with, a ruling that a state agency, exercising its duly delegated powers, cannot constitutionally establish a program designed to increase the number of professionals of particular races. What we cannot understand, and what will create uncertainty, turmoil and confusion, is a ruling that a state may constitutionally pursue that objective but may not do so by programs which rely upon the very characteristic which defines the goal. The constitution may, contrary to our view, enact this paradox. Before special admissions programs in California are either discarded or transformed, however, a final and authoritative answer to that question should be forthcoming.

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Appendix A

FACULTY POLICY GOVERNING ADMISSION TO BOALT HALL

General Rule

Those applicants shall be accepted for admission who on the basis of their academic achievement, LSAT scores and other data appear to have the highest potential for law study and for achievement in and contribution to the legal profession, legal scholarship or law-related activities. No weight shall be given to how an applicant intends to use his legal education. The admission of a few qualified applicants may be influenced by individual circumstances of an exceptional nature which indicate that the applicant has compelling reasons to attend Boalt Hall.

Special Consideration

To the extent that the General Rule would produce an entering class that does not include significant representation of racial or cultural groups which have not had a fair opportunity to develop their potential for academic achievement and which are in need of adequate representation in the legal profession, special consideration shall be given to applicants from such groups. Choices among applicants within any group to be given special consideration shall be made in accordance with the General Rule. In no event shall an applicant be admitted unless it appears that there is a high probability that he or she will be able to complete successfully the course of instruction at Boalt Hall. The number of applicants admitted pursuant to this rule shall be a number calculated to produce an entering class of which up to 25 per cent will have been given this special consideration. Within that limit the number of those specially ad-

mitted will vary with shifts in the quality and availability of applicants and in the number of applicants from the groups given special consideration who gain admission under the General Rule.

SUPPLEMENTARY RESOLUTIONS AND FACULTY INSTRUCTIONS TO THE ADMISSIONS COMMITTEE

On the basis of experience thus far, applicants with a Predicted Grade Average (PGA) of below 68 are insufficiently likely to meet the requirements for admission stated in the rule governing special consideration to warrant their admission. Therefore, for the coming year the Admissions Committee is instructed not to admit applicants with a PGA of below 68 except by a vote of a majority of the faculty committee members. In no sense does this imply a judgment that applicants with a higher PGA meet the stated standards of admission by that fact alone.

It is the expectation of the Faculty on the basis of the quality of applicants last year that these policies will permit the admission of students given special consideration equal to or approaching 25 per cent of an entering class, although, for reasons stated in the rules the number so admitted may not reach this percentage or remain constant from year to year. It is the sense of the faculty that a desirable goal for this program, to be balanced against other admissions considerations rather than being determinative, should be to have roughly equal representation of Black and Chicano students, who together comprise the large majority of the program, with the remaining numbers to come from Asian and Native American applicants.